Supreme Court, U.S.
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No. 06-___

In The

Supreme Court of the United States

ST. LUKE'S SUBACUTE CARE HOSPITAL
and GUY SEATON,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Petitioners' sentence was imposed prior to *United States v. Booker*, 543 U.S. 220 (2005) and in violation of the Sixth Amendment. Before such a sentence violating *Booker* can be reaffirmed, must a district court give criminal defendants an opportunity to submit briefing arguing for a different sentence in light of the factors set forth in 18 U.S.C. § 3553(a), and must the district court address the section 3553(a) factors rather than simply find a guideline sentence reasonable? This question presents some of the same issues this Court will address in *United States v. Rita* (No. 06-5754), in which certiorari was recently granted.

II. Is materiality a necessary element of the offense of submitting false and fraudulent claims, 18 U.S.C. § 287? There is a conflict between the circuits on this important question.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, petitioners Guy Seaton and St. Luke's Subacute Hospital and Nursing Centre, Inc. state that St. Luke's is a privately held corporation. None of its shares is held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, St. Luke's Hospital and Guy Seaton, respectfully pray that a Writ of Certiorari issue to review the judgment and decision of the of United States Court of Appeal for the Ninth Circuit. The questions presented herein involve either important issues already before this Court or are the subject of conflicting opinions between the Courts of Appeal. Supreme Court Rule 10.

OPINION BELOW

The unpublished opinion of the United States Court of Appeal for the Ninth Circuit was filed on May 5, 2006, and is reproduced in Appendix A.

JURISDICTION

On May 5, 2006, a three-judge panel of the United States Court of Appeal for the Ninth Circuit issued an unpublished opinion denying petitioners' appeal. Petitioners filed a timely petition for rehearing. On July 14, 2006, the same panel denied the petition for rehearing without amending the opinion and without further comment. On October 4, 2006, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including November 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and 2254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 287 prohibits submitting "any claim upon or against the United States . . . knowing such claim to be false, fictitious, or fraudulent."

STATEMENT OF THE CASE

Petitioner Guy Seaton owned and operated St. Luke's Hospital. Seaton and St. Luke's were both charged with various criminal counts involving Medicare fraud. The counts included false claims in violation of 18 U.S.C. § 287, false statements in violation of 18 U.S.C. § 1001, obstruction of an audit in violation of 18 U.S.C. § 1516, and conspiracy. A jury convicted both petitioners on all counts.

I. Factual Background

St. Luke's is a nursing home in San Leandro, California, that was owned and operated by Mr. Seaton and his wife. St. Luke's was licensed to provide care for Medicare patients. St. Luke's also provided care to non-Medicare patients. As a result, in order to make claims for Medicare reimbursement, St. Luke's was required to allocate certain costs such as nursing costs between its Medicare and non-Medicare patients.

The government alleged that St. Luke's had overbilled Medicare by allocating too many costs to its Medicare patients. The government submitted evidence at trial that St. Luke's ratio of Medicare to non-Medicare nursing costs was very high by industry standards, that St. Luke's did not have documentation to support that ratio, and that Mr. Seaton had instructed employees to allocate certain

non-Medicare costs to Medicare. The government also alleged that in response to an audit, petitioners created false documents to support the reimbursement claims it had submitted.

II. Sentencing

Petitioners' sentences were imposed prior to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). As a result, the sentences were calculated under the Federal Sentencing Guidelines – then presumed to be mandatory – without regard to the factors set forth in 18 U.S.C. § 3553(a).

Sentencing was complicated, to say the least, because the district court had great difficulty establishing the amount of loss caused or intended by the petitioners' crimes. The government submitted no fewer than four different loss calculations. Throughout the sentencing proceedings, the district court expressed its frustrations, noting that the government's calculations were "all over the place."

The district court initially settled on a loss figure of approximately $250,000, but then, after the government filed a motion to reconsider, settled on a much higher loss figure of approximately $1.6 million. The revision dramatically increased petitioners' sentences. Petitioners, who had acquiesced in the $250,000 figure, sought an opportunity to present evidence that the $1.6 million was erroneous, but the district court denied their motion. On April 15, 2004, utilizing the 1.6 million dollar figure and applying other mandatory guideline provisions, the district court sentenced Seaton to a term of 78 months in the Bureau of Prisons. (Dkt. 199)

In January of 2005, this Court issued its decision in *Booker*. On April 11, 2005, in the course of addressing Seaton's motion for release pending appeal, which raised, *inter alia*, a claim that a new sentencing hearing was required under *Booker*, the district court commented that its mandatory application of the guidelines had constituted "plain error under present Ninth Circuit law," but added, without further explanation, that it saw "no reason why it would not impose the same sentence" because "it would be reasonable to impose that sentence if the Court were directed to reconsider defendant' sentence in light of *Booker*." (*See* App. 23) The district court's denial of Seaton's motion for release pending appeal was thereafter reversed by a panel of the Ninth Circuit and he remains at liberty awaiting final decision of this appeal.

III. Ninth Circuit Proceedings

Petitioners raised several claims on appeal. They argued, *inter alia*, that the district court had denied them their opportunity to present evidence in support of their proposed loss calculation, and that *Booker* required a remand for re-sentencing. The Ninth Circuit denied the *Booker* claim because the district court had indicated its intent to impose a similar sentence. (App. 7-8)

Petitioners also argued that the false claims convictions must be reversed because the jury was not instructed on materiality, a necessary element of the offense. The Ninth Circuit panel declined to reach the issue because, in response to the government's objection at trial, petitioners had withdrawn their proposed materiality instruction at trial. (App. 3-4)

A Petition for Writ of Certiorari is taken from the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. A DISTRICT COURT AFFIRMING A PRE-*BOOKER* SENTENCE MUST FIRST GIVE A CRIMINAL DEFENDANT THE OPPORTUNITY TO PRESENT ARGUMENTS IN FAVOR OF A DIFFERENT SENTENCE

The Circuit Courts have set forth procedures for re-sentencing after a *Booker* remand. Those procedures incorporate a principle, sounding in Due Process, that defendants have a right to be present at arguments during re-sentencing proceedings.

The Second Circuit held in *United States v. Crosby*, 397 F.3d 103, 120 (2d Cir. 2005), that before deciding whether to re-sentence in light of *Booker*, a district court "should obtain the views of counsel, at least in writing." Several other circuits quickly established the same rule. *See, e.g.*, *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 770 (D.C. Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005).

Both the Seventh Circuit and the Ninth Circuit have held, moreover, that the opportunity to present argument is mandatory, not discretionary. As the Seventh Circuit said, "By 'should' in the quoted passage [from *Crosby*] we understand 'must.'" *Paladino*, 401 F.3d 484. The Ninth Circuit recently addressed the issue squarely: "it is clear that allowing the parties to file written submissions is most consistent with the procedure laid down in *Ameline*,

and indeed, is necessary for the district court to meaningfully comply with *Ameline's* remand procedure." *United States v. Montgomery*, 462 F.3d 1067, 1070 (9th Cir. 2006).

The reason for such a requirement is clear. Pre-*Booker* sentencing proceeded on the assumption that the Sentencing Guidelines were mandatory. Post-*Booker* sentencing, by contrast, allows consideration of a broader array of factors bearing on reasonableness, such as the factors set forth in 18 U.S.C. § 3553(a). *See Booker*, 543 U.S. at 245-46, 261.[1] Fairness requires that a defendant should have some opportunity to present an argument that those factors militate in favor of a different sentence. In other words,

> there may be considerations that were either not presented or not emphasized during the original sentencing procedure that now, under [*Booker*], provide a basis for re-sentencing. Unless these factors are called to the district court's attention through written submission, the district court cannot faithfully fulfill its mandate under [*Booker*].

Montgomery, 462 F.3d at 1071.

There is thus no question that if the petitioners had received a *Booker* remand, they would have been entitled to present briefing in support of a new sentence. Nonetheless, the Ninth Circuit panel below held that petitioners were not entitled to a remand because the district court

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[1] "Indeed, district courts may even consider factors that were precluded from consideration altogether prior to *Booker*, such as drug and alcohol dependence, lack of guidance as a youth, and personal financial difficulties and economic pressures." *Ameline*, 409 F.3d at 1093 (Wardlaw, J., dissenting).

indicated that it would impose the same sentence. The district court did so, however, in the context of denying a release on appeal motion without affording petitioners an opportunity for briefing of the section 3553 standards.

Those two rules are obviously inconsistent. A district court may not, post-remand, affirm a sentence without affording an opportunity for argument. And yet, under the panel's ruling below, a district court may, pre-remand, affirm a sentence without affording an opportunity for argument. But if a district court's statement of intent to re-affirm a sentence, without more, would be insufficient following a *Booker* remand, why should it be sufficient prior to an appeal? If a district court cannot evade its re-sentencing obligations with a summary statement of intent to impose the same sentence, why should it be able to evade remand with such a statement? Why should the opportunity for briefing be afforded only for post-remand re-sentencing proceedings?

The district court in this case stated its intent to impose the same sentence, but the petitioners were never given an opportunity to argue that the broader array post-*Booker* sentencing factors should result in a different sentence. As several circuits have recognized, implicitly or explicitly, fairness requires such an opportunity. The current approach adopted by several circuits, including the Ninth, makes a defendant's right to present an argument depend on the mere "fortuity of whether a defendant was sentenced by a particular sentencing judge" who stated some intent to impose the same sentence. *See Ameline*, 409 F.3d at 1105 (Gould, J., dissenting).

This Court should grant certiorari to clarify whether a defendant must be given an opportunity to argue for a new sentence and whether, in the absence of such an opportunity, remand is required.

II. THIS COURT SHOULD DEFER CONSIDERATION OF HIS CASE UNTIL IT HAS ISSUED A DECISION IN *UNITED STATES V. RITA*

Petitioner's case presents some of the same issues that this Court will address in *United States v. Rita* (Supreme Court No. 06-5754).

In *Rita*, the district court imposed a sentence within the Guidelines range. Although it stated that it had considered the factors set forth in 18 U.S.C. § 3553(a), it did not explicitly weigh those factors. The Fourth Circuit affirmed the sentence in an unpublished opinion. It reasoned that within-Guidelines sentences are presumptively reasonable and that the district court had properly considered the section 3553(a) factors.

On November 3, 2006, this Court granted certiorari in *Rita*. It instructed the parties to address three questions:

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C.

§ 3553(a) factors and any other factors that might justify a lesser sentence?

All three questions are presented in this case as well.

The district court in this case initially sentenced petitioner prior to *Booker*. It treated the Guidelines as mandatory. Its initial sentence therefore violated the Sixth Amendment. Following *Booker*, the district court, in the course of ruling on a motion for release pending appeal, stated that it would have simply imposed the same sentence again in the new advisory Guidelines regime because to do so would be reasonable.

As in *Rita*, the district court afforded a strong presumption of reasonableness to the Guidelines sentence. As in *Rita*, the district court failed to conduct any explicit analysis of the section 3553(a) factors. Consequently, Mr. Seaton's petition depends in part on this Court's ultimate determination of the questions presented in *Rita*. This case should be deferred until *Rita* is decided.

III. THE CRIME OF SUBMITTING FALSE AND FRAUDULENT CLAIMS PROHIBITED BY 18 U.S.C. § 287 INCLUDES A NECESSARY ELEMENT OF MATERIALITY

The circuit courts are split as to whether materiality is an element of a section 287 offense. *Compare, e.g.*, *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974) (holding that materiality is an element of false claims), *and United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (same); *with United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992) (holding that materiality is not an element of false claims), *and United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984) (same).

In *Neder v. United States*, 527 U.S. 1 (1999), this Court held that materiality is an element of mail fraud even though the text of the statute does not mention materiality. This Court reasoned that at common law, fraud included an element of materiality, and that in enacting the mail fraud statute, Congress intended to incorporate the common law definition. *Id.* at 20-25.

The rationale of *Neder* applies with full force to § 287. As an examination of the statutes legislative history makes clear, section 287 is simply another type of fraud statute.

The false claims law was passed to prevent wartime fraud upon the government. Proponents of the early false claims act argued that the government was being "shamefully defrauded." Reports of Committee, 2d Sess. 37th Cong., Vol. 2, 1861-62. In describing the earliest false claims law, the law's Senate manager stated: "It is a bill to prevent and punish frauds upon the government of the United States; and I am very anxious to have it acted upon." Congressional Globe, 37th Cong. 3d Sess. 952; *see also United States v. McNinch*, 356 U.S. 595, 599-600 n.9 (1958) (quoting additional statements).

Section 287 was enacted as a re-codification of the earlier false claims laws; like its predecessors, it is an anti-fraud statute. It prohibits "fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). It punishes defendants who use "fraudulent means to secure an unjustified monetary payment from the government." *United States v. McBride*, 362 F.3d 360, 369 (6th Cir. 2004).

Under *Neder*, because section 287 is a fraud statute, materiality is a necessary element of the offense. In fact,

the Fifth Circuit, which had rejected a materiality element, *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996), has recognized that *Neder* overruled its previous holding on the issue. "[W]e read *Neder* to require a materiality instruction and the better practice would be to give the instruction in a § [287] false claim offense." *United States v. Foster*, 229 F.3d 1196, 1196 n.1 (5th Cir. 2000).

This Court should grant review to resolve the circuit split and determine whether materiality is an element of the section 287 false claim offense.

CONCLUSION

The core false claims convictions in this case were obtained without an instruction on materiality, an essential element of the offense. Moreover, petitioners sentences were imposed in violation of the Sixth Amendment, and they were given no opportunity to argue why they should be entitled to a different sentence under the post-*Booker* regime. Petitioners now request that this Court grant review to settle these important legal issues.

Dated: November 13, 2006

Respectfully submitted,

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178 Fed.Appx. 711

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ST. LUKE'S SUBACUTE CARE HOSPITAL, INC.; et al., Defendants-Appellants.	No. 04-10231 D.C. No. CR-02-00044-MHP MEMORANDUM* (Filed May 5, 2006)

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted April 3, 2006
San Francisco, California

Before: B. FLETCHER, BEEZER, and FISHER, Circuit Judges.

Guy Seaton ("Seaton") appeals his conviction and 78-month sentence for six counts stemming from Medicare fraud, and St. Luke's Hospital ("St. Luke's") (together with Seaton, "appellants") appeals its five-year probation. We have jurisdiction under 18 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Because the parties are familiar with the facts, we do not recite them in detail. Prior to his indictment in this action, Seaton was the owner and Chief Executive Officer of St. Luke's, a nursing facility in San Leandro, California. At trial, former employees testified that Seaton instructed them to falsify nursing schedules, payroll reports, and time-cards to support Medicare reports. They also testified that Seaton instructed them to create a fictitious floor plan that segregated Medicare patients from non-Medicare patients and to tell auditors, falsely, that St. Luke's assigned more-expensive registered nurses to Medicare patients and less-expensive licensed vocational nurses to non-Medicare patients.

Appellants were indicted on May 8, 2001. Count 1 – the conspiracy count – alleged that appellants inflated their cost reports and fabricated payroll reports, time-cards, and nursing schedules; submitted false cost reports for 1996, 1997, and 1998; created false nursing logs and schedules in preparation for a Medicare audit; and made false statements to auditors from Mutual of Omaha, a fiscal intermediary acting on behalf of the Medicare program, during its audit. Counts 2, 3, and 4 – the false-claims counts – charged appellants with submitting false cost reports for 1996, 1997, and 1998. Counts 5 and 6 were related to the audit by Mutual of Omaha and charged appellants with making the false statement that "certain nurses worked 100% of their time on Medicare patients" (Count 5) and obstructing a federal audit by failing to furnish the actual nursing schedules necessary to assure proper payment by the Medicare program (Count 6).

A jury returned a guilty verdict on all counts, and the district court sentenced Seaton to 78 months' imprisonment and three years' supervised release, denying his

request for release pending appeal. St. Luke's was placed on probation for five years.[1]

I. Materiality under 18 U.S.C. § 287

Appellants contend that their convictions on Counts 2, 3, and 4 should be reversed because the district court failed to give the jury a materiality instruction under 18 U.S.C. § 287. Although appellants proposed an instruction containing a materiality requirement, they withdrew it in response to the government's objection. The government argues that appellants therefore waived the issue under the doctrine of "invited error." *See United States v. Hugs*, 384 F.3d 762, 766-67 (9th Cir.2004).

Our court has yet to resolve definitively whether materiality is required under § 287. *See United States v. Taylor*, 66 F.3d 254 (9th Cir.1995) (per curiam) (implicitly rejecting, without affirmatively holding, that there is no materiality requirement under § 287), *cert. denied*, 520 U.S. 1103 (1997); *see also Li v. Ashcroft*, 389 F.3d 892 (9th Cir.2004) (stating, without affirmatively holding, that there is no materiality requirement under § 287).[2] Consequently,

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[1] Seaton was released on bail by order of a two-judge panel of this court on May 24, 2005.

[2] We hesitate to read *Taylor* and *Li* as holding that there is no materiality requirement under § 287 given intervening Supreme Court decisions that accord greater weight to legislative history over and above statutory text. *See Neder v. United States*, 527 U.S. 1 (1999) (holding that materiality is an element of 18 U.S.C. §§ 1341, 1343 and 1344 even though those statutes do not explicitly incorporate the term "material" because the legislative history indicates Congress intended to incorporate the common law meaning of "fraud," which included a materiality element); *United States v. Wells*, 519 U.S. 482 (1997) (holding that there is no materiality element in 18 U.S.C. § 1014

(Continued on following page)

there is no "known right" that appellants could possibly have waived. *See United States v. Fiorillo*, 186 F.3d 1136, 1155 (9th Cir.1999). But neither is there plain error, since any instructional error is not "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir.1997) ("When the state of the law is unclear at trial and only becomes clear as a result of later authority, the district court's error is perforce not plain."). Nor did the instruction undermine appellants' substantial rights or "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Fiorillo*, 186 F.3d at 1154 (internal citations and quotation marks omitted).

II. Ambiguity in Medicare Reporting Requirements

Appellants argue that the district court erred in failing to grant their proffered instruction regarding ambiguity in the Medicare reporting requirements and in articulating the instruction in a way that confused the jurors. The court reviews jury instructions de novo "when the issue is whether the instructions given adequately presented the defendant's theory of the case." *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir.2000). "[T]he relevant inquiry is whether the instructions as a whole are adequate to guide the jury's deliberation." *Id.*

We hold that the district court properly instructed the jury in accordance with the language from *Munoz*. The cases cited by appellants from other circuits are not on

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because the term "material" was not included in the statute and the legislative history indicates that Congress intended to include non-material offenses).

point; those cases involved good-faith efforts by Medicare recipients to interpret ambiguous rules, which often left room for interpretation. *See, e.g., United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir.1994). That is not the case here. The court's instructions were sufficiently clear and would by no means have confused a reasonable juror. *See Francis v. Franklin*, 471 U.S. 307, 316 (1985).

III. Unanimity Instruction

Appellants argue that the court erred by not instructing the jury on specific unanimity on Count 5 (false representation) and Count 6 (obstructing an audit). However, neither charge involved more than one distinct offense. Although the government attempted to prove the false statement by eliciting testimony from several different witnesses, "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad v. Arizona*, 501 U.S. 624, 632 (1991) (internal citation and quotation marks omitted).

Neither Count 5 nor Count 6 required the jury to consider a duplicitous count or, for that matter, multiple or complex findings warranting a unanimity instruction. This case, rather, "is a routine one in which the jury is called upon to make relatively simple inferences respecting criminal activity." *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir.1983) (Kennedy, J.). There was no instructional error and, consequently, no plain error.

IV. Appellants' Hearsay Objection

Appellants contend that the district court erroneously excluded "critical information" concerning Seaton's mental

state when it sustained the government's hearsay objection and prevented Orrin Grover, former counsel to St. Luke's, from providing certain testimony concerning his conversation with Seaton in preparation for the audit. The district court's hearsay rulings are reviewed for abuse of discretion. *United States v. Bishop*, 291 F.3d 1100, 1108 (9th Cir.2002).

We do not see how Grover's testimony could come in for anything other than the truth of the matter asserted, and therefore we conclude that the proffered testimony constituted inadmissible hearsay. Regardless, appellants were not "denied the right to present their defense." *Bishop*, 291 F.3d at 1109.

V. *In Camera* Review of the Agent's Rough Notes

Appellants argue that the district court erred in failing to conduct an *in camera* review of the government's rough notes from interviews with St. Luke's employees under *Brady v. Maryland*, 373 U.S. 83 (1963), to ensure that the notes did not contain exculpatory material. "[D]iscovery questions, including alleged *Brady* . . . rulings," are reviewed for abuse of discretion. *United States v. Alvarez*, 358 F.3d 1194, 1210 (9th Cir.2004). To prevail, appellants "must show not only that the district court abused its discretion, but also that the abuse resulted in prejudice to [their] 'substantial rights.'" *Id.* (citing *United States v. Michaels*, 796 F.2d 1112, 1115 (9th Cir.1986)).

In this situation, unless a defendant can explain how the requested evidence might affect the outcome of the trial, the district court is under no obligation to conduct an *in camera* review. *See id.* at 1211 (holding that, in the absence of a showing of materiality, "the district court

need not conduct an *in camera* review of the government's files for *Brady* evidence favorable to the accused"); *see also United States v. Henke*, 222 F.3d 633, 642-43 (9th Cir.2000) (holding that the district court had no duty to conduct an *in camera* review of an agent's rough notes because "defendants made no showing that they might discover something exculpatory or impeaching"). Appellants fail to state with any specificity why the review was necessary; consequently, there is no basis for their request for an *in camera* review of the rough notes.

VI. *Booker* Error and *Ameline* Remand

At sentencing, the district court calculated Seaton's final offense level to be 28 based on the following determinations:

Base offense level	6
Upward adjustment for the loss of $1,621,343	12
Enhancement for more than minimal planning	2
Enhancement for being an organizer/leader	4
Enhancement for abusing a special skill/position of trust	2
Enhancement for obstructing justice	+2
Total	28

Appellants argue that the district court's determinations regarding the upward adjustment and enhancements of Seaton's offense level are unconstitutional under *United States v. Booker*, 543 U.S. 220 (2005), and must be vacated. However, the district court made clear during sentencing that it would impose the same sentence under an advisory scheme. Thus, we see no reason for remand. *Cf. United States v. Ameline*, 409 F.3d 1073, 1077 (9th

Cir.2005) (en banc) ("[I]f a particularly prescient sentencing judge, pre-*Booker*, had made and used the same extra-verdict findings under the same mandatory guidelines regime, but made clear that he was treating the Guidelines as advisory rather than binding, no Sixth Amendment violation would have occurred under *Booker*.").

VII. Loss Determination

Appellants' final argument is that the district court's loss determination for sentencing purposes is unsubstantiated. We review the district court's loss determination for clear error. *See United States v. King*, 257 F.3d 1013, 1025 (9th Cir.2001).

The Sentencing Guidelines provide a base offense level for fraud that increases in accordance with the amount of monetary loss. U.S.S.G. §§ 2F1.1(a), (b)(1). "For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. . . . The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss." U.S.S.G. § 2F1.1, cmt. n.9.

The government essentially submitted three different loss assessments, all of which are attempts to determine the difference between the amounts St. Luke's was entitled to receive and the amounts it did receive. First, the Indictment lists a figure of $1,621,343 in allegedly false claims. Second, at trial, the government attempted to recalculate that figure as $2,979,100, which included amounts that were omitted from the Indictment figure and that defendants claimed (and received) under an exception

to the "routine cost limit." Third, at sentencing, the government tried to simplify its calculation, essentially returning to the method used in the Indictment, excluding the routine-cost-limit exemptions and also excluding various overhead charges associated with nursing costs. This third figure totaled $1,539,800, roughly $80,000 less than the Indictment figure.[3] The government argued that it was seeking repayment for *actual loss* to the government, not *intended loss*, the latter of which would have been higher because it would include everything St. Luke's attempted to claim, including reimbursements it was denied after the government began to suspect fraud.

The district court noted the difficulty in calculating loss and ultimately decided to credit the original Indictment figure. The court initially subtracted from the Indictment figure the amount to which St. Luke's would be entitled for the legitimate provision of services to Medicare patients and determined a total loss of $257,816. The court failed to realize that the Indictment already took that amount into consideration and, upon the government's motion for reconsideration which pointed out the district court's double-counting of the amount owed St. Luke's, recalculated the loss at $1,621,343. The district court gave appellants an additional opportunity to respond but found "nothing in the defendants' response convinc[ing] . . . that the $1,621,343 figure is incorrect." The court reaffirmed its loss figure of $1,621,343.

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[3] As the government explained in its briefing, the $80,000 difference is based on (1) the error in the routine cost limit used in calculating the Indictment figure and/or (2) the exclusion of overhead charges in the figure submitted at the hearing.

The district court's conclusions on this rather complicated matter do not constitute clear error. The loss determination need only be an estimate, and, even if the government's proffered figure at the hearing was more correct than the original Indictment figure, the $80,000 differential is of no consequence for Sentencing Guidelines purposes, as the upward adjustment at issue requires a finding of loss between $1,500,000 and $2,500,000. *See* U.S.S.G. §§ 2F1.1(b)(1)(M) and (N) (2000).[4] *Accord King*, 257 F.3d at 1025 ("Given the conflicting estimates presented to the court, the difficulty inherent in calculating loss caused by a mail fraud scheme and the liberality embodied in § 2F1.1 of the Guidelines, the court did not clearly err in determining the amount of loss and the attendant increase in offense level.").

For the reasons stated above, appellants' conviction and sentences are affirmed.

AFFIRMED.

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[4] Had the district court considered intended loss as opposed to actual loss, *see* U.S.S.G. § 2F1.1, cmt. n.8 (2000) (district court can consider either actual loss or intended loss), and/or losses incurred during the pre-Indictment period, *cf. United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir.) (basing restitution order under the Victim Witness Protection Act in mail-fraud case upon related conduct for which the defendant was not convicted), *cert. denied*, 539 U.S. 950 (2003), the figure could have been much higher than $2,500,000, triggering a larger enhancement.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ST. LUKE'S SUBACUTE CARE HOSPITAL, INC.; et al., Defendants-Appellants.	No. 04-10231 D.C. No. CR-02-00044-MHP Northern District of California, San Francisco ORDER (Filed May 24, 2005)

Before: CANBY and McKEOWN, Circuit Judges.

Appellant's motion for bail pending appeal is granted. Appellant has shown, by clear and convincing evidence, that appellant is not likely to flee or to pose a danger to the safety of any other person or the community if released and has also shown that the appeal raises a "substantial question" of law or fact that is likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment, on all counts on which imprisonment has been imposed. *See* 18 U.S.C. § 3143(b); *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (defining a "substantial question" as one that is "fairly debatable," and "is one of more substance than would be necessary to a finding that it was not frivolous.").

The matter is remanded to the district court for the limited purpose of establishing appropriate conditions of release.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GUY ROLAND SEATON, Defendant, /	No. CR 02-0044-02 MHP **MEMORANDUM & ORDER** **Re: Defendant's Renewed Motion for Release on Bail Pending Appeal**

Filed Apr. 11, 2005

On December 19, 2002, a jury found defendant Guy Roland Seaton guilty on all counts of a six count indictment arising from the submission of fraudulent claims to the federal Medicare program Defendant was subsequently sentenced to seventy-eight months imprisonment and three years of supervised released. Having appealed his conviction and sentence, defendant now renews his motion for release on bail pending the resolution of that appeal. Having considered the parties' arguments and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

Prior to his indictment in the instant action, Guy Roland Seaton ("defendant") was the owner and Chief Executive Officer ("CEO") of St. Luke's Subacute Hospital and Nursing Centre, Inc. ("St. Luke's"), a nursing facility located in San Leandro, California. The charges against defendant arose from a scheme to defraud the Medicare program by inflating reimbursable nursing costs for care

provided to Medicare recipients admitted to St, Luke's. Following an investigation into the hospital's billing practices by the Department of Health and Human Services ("DHS") Office of the Inspector General, a grand jury returned a six count indictment against both defendant and St. Luke's. The indictment charged both defendants with conspiracy to defraud the Medicare program in violation of 18 U.S.C. § 371 (Count 1), three making or presenting false claims upon the United States in violation of 18 U.S.C. § 287 (Counts 2-4), knowingly and willfully making false statements to federal auditors in violation of 18 U.S.C. § 1001 (Count 5), and obstructing a federal audit in violation of 18 U.S.C. § 1516 (Count 6). On December 19, 2002, a jury found both defendants guilty on all counts.

On April 15, 2004, the court sentenced defendant to seventy-eight months imprisonment an three years supervised released. At that time, the court also denied defendant's request to be release on bail pending appeal of his sentence and conviction. On July 26, 2004, defendant filed a "renewed" motion for release on bail pending appeal. In his renewed motion, defendant argued that his release on bail was warranted in light of the Supreme Court's decision in *Blakely v. Washington*, ___U.S.___, 124 S. Ct. 2531 (2004), which raised serious concerns regarding the constitutionality of sentences imposed under the United States Sentencing Guidelines.

With the consent of the parties, the court deferred the adjudication of defendant's motion until the Supreme Court could consider the issues that *Blakely* left unresolved. Those issues have since been addressed by the Court's decision in *United States v. Booker*, ___U.S.___, 125 S. Ct. 738 (2005), which held that the mandatory application of the Sentencing Guidelines violates a criminal

defendant's Sixth Amendment right to trial by jury. *Id.* at 758. Following the issuance of the *Booker* decision, defendant reasserted his claim that he is entitled to release on bail pending appeal. The following memorandum and order considers the arguments raised by defendant's motion.

LEGAL STANDARD

Under the Bail Reform Act of 1984, 18 U.S.C. § 3143(b), a court must order a criminal defendant released on bail pending the appeal of his or her conviction or sentence if the court finds:

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). For purposes of applying section 3143(b), the Ninth Circuit has observed that a "substantial question" of law or fact "is one that is fairly debatable or

fairly doubtful." *United States v. Montoya,* 908 F.2d 450, 450 (9th Cir. 1990) (citing *United States v. Handy,* 761 F.2d 1279, 1283 (9th Cir. 1985) and *D'Aquino v. United States,* 180 F.2d 271, 272 (11th Cir. 1950)), *cert. denied,* 516 U.S. 821 (1995). While this standard does not require a showing that the defendant is likely to prevail on appeal, *see Handy*, 761 F.2d at 1280-81, "it is one of more substance than would be necessary to a finding that [the defendant's claim] was not frivolous." *Montoya,* 908 F.2d at 450. Furthermore, even if a substantial question of law is presented on appeal, release on bail is appropriate only if resolution of that question in the defendant's favor is likely to result in the reversal of his or her conviction, a new trial, or a reduction in the defendant's sentence that would likely lead to release before the appeals process has run its course. 18 U.S.C. § 3143(b)(1)(B).

DISCUSSION

In his renewed motion for release on bail pending appeal, defendant submits that he will present to the Ninth Circuit three "substantial questions of law or fact" that warrant his release under 18 U.S.C. § 3143(b)(1). According to defendant, he will argue on appeal that his convictions on three counts of making false claims upon the United States in violation of 18 U.S.C. § 287 must be reversed because the court refused to instruct the jury that materiality of falsehood is an element of the offense charged. Second, defendant will argue that his conviction under 18 U.S.C. § 1001 for making false statements in a matter within the jurisdiction of the United States government requires reversal on duplicity grounds. Finally, defendant seeks to appeal his sentence on the ground that it was imposed in violation of his Sixth Amendment right

to trial by jury as interpreted by the Supreme Court in *Blakely* and *Booker*. The court considers each of these issues below.

I. Materiality as an Element of Section 287

Defendant first claims that the question of whether materiality of falsehood is an element of the offense defined by 18 U.S.C. § 287 raises a substantial question of law that requires his release on bail pending appeal. Section 287 prohibits any person from knowingly making or presenting "false, fictitious, or fraudulent" claims upon or against the United States. 18 U.S.C. § 287.[1] According to defendant, a conviction under section 287 requires a jury finding that the false representation made in such a claim was material – that is to say, that the representation would have had "a natural tendency to influence . . . the decision of the decisionmaking body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)) (original alterations and internal quotation marks omitted). Thus, because in the instant action the court did not instruct the jury that materiality is an element of section 287, defendant has appealed his convictions on counts 2 through 4 on the ground that they were obtained in violation of his right to have every element of an offense submitted to a jury and proven beyond a reasonable doubt.[2]

Absent a change in Ninth Circuit law, defendant will not prevail on this claim, In *United States v. Taylor*, 66 F.3d 254 (9th Cir. 1995) (per curiam), *cert. denied*, 520 U.S. 1103 (1997), the court considered an appeal by a defendant convicted of five counts of making false claims in violation

of section 287 and one court of making false statements in violation of 18 U.S.C. § 1001. *Id.* at 254. The defendant argued that the district court erred in refusing to instruct the jury that materiality of falsehood was an element of both offenses, and the court agreed insofar as section 1001 was concerned. *Id.* at 255. However, the court upheld the defendant's convictions on the false claims charges, observing that "the court has never held that materiality is an implicit element of 18 U.S.C. § 287." *Id.*

Defendant characterizes this remark as dicta, arguing that the holding of *Taylor* was instead grounded on that court's erroneous interpretation of *United States v. Gaudin,* 28 F.3d. 943 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. 506 (1995).[3] Admittedly, *Taylor* is somewhat ambiguous as to whether the absence of a materiality element in section 287 was an alternative ground for upholding the defendant's convictions on the false claims counts. However, even if the question of whether *Taylor's* observations regarding the materiality issue were made in dicta might have been fairly debatable at the time that the case was decided, such a position is no longer tenable in light of subsequent Ninth Circuit decisions. Indeed, in *Li v. Ashcroft,* 389 F.3d 892 (9th Cir. 2004), the court stated without qualification that "[t]he elements of the offense created by 18 U.S.C. § 287 are (1) presenting a claim against the United States, and (2) knowing such claim to be false." *Id.* at 896 (quoting *United States v. Causey,* 835 F.2d 1289, 1292 (9th Cir. 1987)); *see also United States v. Uchimura,* 125 F.3d 1282, 1284 (9th Cir. 1994) (citing *Taylor* for the proposition that a jury not need be given a materiality instruction "if materiality is not an element of the crime charged"), *cert. denied,* 525 U.S. 863 (1998). Courts outside this Circuit have given *Taylor* the same

gloss, observing that materiality is not an element of section 287 under Ninth Circuit law. *See, e.g., United States v. Nash,* 175 F.3d 429, 433 (6th Cir.), *cert. denied,* 528 U.S. 888 (1999); *United States v. Upton,* 91 F.3d 677, 684-85 (5th Cir. 1996), *cert. denied,* 520 U.S. 1228 (1997).

In short, it cannot be reasonably disputed that under established Ninth Circuit law, proof of materiality of falsehood is not required to sustain a conviction for making false claims upon the United States. Nonetheless, defendant suggests that a Ninth Circuit panel is free to ignore such precedent in order to bring the law of this Circuit in line with the Supreme Court's holding in *Neder v. United States,* 527 U.S. 1 (1999). The *Neder* Court considered a challenge to convictions under federal mail, wire, and bank fraud statutes, each of which requires proof of a "scheme or artifice to defraud." *Id.* at 20 (citing 18 U.S.C. §§ 1341, 1343-44). Relying on the definition of fraud at common law, the Court held that the language of the statutes at issue implicitly requires proof of materiality. *See id.* at 25.

Defendant argues that this reasoning applies with equal force to section 287. However, such a position ignores significant differences in the language of mail, wire, and bank fraud statutes at issue in *Neder* and the language used to define the offense at issue here. Rather than requiring proof of a "scheme or artifice to defraud," section 287 imposes liability on anyone who knowingly "makes or presents . . . false, fictitious, or fraudulent claims" upon or against the United States. 18 U.S.C. § 287. In this respect, the offense of making false claims more closely resembles 18 U.S.C. § 1014, which prohibits, *inter alia,* "knowingly mak[ing] any false statement or report" for the purpose of influencing a bank insured by

the Federal Deposit Insurance Corporation ("FDIC"). 18 U.S.C. § 1014. As the Supreme Court observed in *United States v. Wells,* 519 U.S. 482 (1997), such language "carries no general suggestion of influential significance." *Id.* at 490 (citations omitted). Rather, as with section 287, liability under the section 1014 attaches to the act of "mak[ing]" (or in the case of section 287, "mak[ing] or present[ing]") a false statement to a payer. *See id.* at 491-92. Thus, reading section 1014 literally, the *Wells* Court held that materiality is not an element of the offense of making false statements to a bank. *Id.* at 499-500.

The court finds Wells to be dispositive of the instant motion. While defendant's argument that materiality is an element of section 287 is merely a poor one if *Neder* is read in isolation, any suggestion that a Ninth Circuit panel has the authority to reconsider *Taylor* is conclusively foreclosed by the obvious parallels between the question presented in *Wells* and the materiality issue raised by defendant's motion. Against such established Ninth Circuit and Supreme Court precedent, defends can cite only *United States v. Foster,* 229 F.3d 1196 (5th Cir. 2000), *cert. denied,* 531 U.S. 1197 (2001), for the proposition that *Neder* requires proof of materiality to impose liability under section 287. *See id.* at 1196 n.1. However, the Foster court's view is the dictum of a panel in another circuit, and in any event, it is wrong. Thus, although perhaps not frivolous, defendant's argument does not raise a fairly debatable question of law in the circuit in which this court sits. The court therefore holds that the its refusal to instruct the jury that materiality is an element of 18 U.S.C. § 287 does not raise a substantial question of law or fact that would warrant defendant's release on bail pending appeal.[4]

II. Duplicity of Section 1001 Count

The next argument on which defendant premises his right to be released on bail pending appeal is his contention that his conviction for making false statements in violation of 18 U.S.C. § 1001[5] was duplicitous – i.e., that it joined more than one offense in a single count. According to defendant, the duplicity of the section 1001 offense charged in count 5 arises from the fact that the government submitted evidence that defendant made more than one misrepresentation in furtherance of his scheme to defraud the Medicare program. This in turn gives rise to the possibility that the jury might have returned a verdict of guilty on the false statements charge without agreeing unanimously that any particular false statement had been made, since proving that had any one of those misrepresentations occurred would have been sufficient to convict defendant under section 1001. Consequently, defendant argues that the court erred in failing to instruct the jury that it could not return a guilty verdict on the false statement charge unless the jurors agreed unanimously as to which of the distinct offenses charged had actually been committed. *Cf. United States v. Ramirez-Martinez,* 273 F.3d 903, 915 (9th Cir. 2001) (observing that unanimity instruction may cure a duplicitous indictment), *cert. denied,* 537 U.S. 930 (2002).

The problem with defendant's claim that the court erred in failing to give a unanimity instruction is that defendant's own proposed jury instruction, which included no such cautionary language, invited the court to do so. *See* Defs.' Proposed Jury Instructions at 10 (proposing 9th Circuit Model Criminal Jury Instruction 8.66). Thus, at best, defendant's duplicity claim is subject to review for

plain error. *See United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (observing that jury instructions proposed by a criminal defendant are reviewable for plain error unless the defendant knowingly relinquishes his right to object to a flawed instruction, in which case review is barred by the invited error doctrine). However, nothing in the record suggests that the court's failure to give a unanimity instruction "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings," as would be required to reverse defendant's conviction under the plain error standard. *United States v. Olano*, 507 U.S. 725, 736 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); *see also United States v. Technic Serves., Inc.*, 314 F.3d 1031, 1040 n.3 (9th Cir. 2002) (citation omitted) (observing that a district court's failure to remedy a duplicitous count with a specific unanimity instruction is reviewed for plain error). Indeed, in returning a guilty verdict on the conspiracy count, the jury unanimously found that defendant committed the overt acts of submitting cost reports falsely claiming nursing services costs for Medicare patients in 1997, 1998, and 1999. Def.'s Supp. Mem. P. & A., Exh. C. at 10. Any one of those findings is sufficient to support a conviction for the substantive offense of making false statements in violation of section 1001. Thus, because it cannot be fairly debated that the Ninth Circuit will uphold defendant's conviction for that offense, the court concludes that defendant's duplicity argument does not present a substantial question of law or fact that warrants his release on bail pending appeal.

III. Sentencing

Finally, defendant argues that in light of the Supreme Court's decision in *Booker,* the court's reliance on the United States Sentencing Guidelines for the purpose of determining his sentence presents a substantial question of law on appeal. As noted above, *Booker* held that the system of mandatory sentencing guidelines established by the Federal Sentencing Act violates a criminal defendant's Sixth Amendment right to trial by jury. 125 S. Ct. at 758. Nevertheless, the Court severed the offending provisions of the Act making the imposition of a sentence within the guidelines range mandatory and instructed district courts to treat the guidelines as "advisory". *Id.* at 757. Thus, under *Booker,* a district court should "consider" the range of sentences that could be imposed under the guidelines but may ultimately "tailor the sentence in light of other statutory concerns as well." *Id.* (citing 18 U.S.C. § 3553(a)). Appellate review of the district court's balancing of such considerations is guided by a standard of reasonableness. *Id.* at 766-67; *see also United States v. Ameline,* 400 F.3d 646, 655 (9th Cir.), *reh'g en banc granted,* ___F.3d___, No. 02-3032, 2005 WL 612710 (9th Cir. Mar. 11, 2005).

Here, there is no question that the court's reliance on the Sentencing Guidelines in determining defendant's sentence and its presumption that the sentencing range determined under the guidelines was mandatory amounted to plain error under present Ninth Circuit law. *See Ameline,* 400 F.3d at 655. However, to warrant releasing defendant on bail pending appeal, such an error must at a minimum be likely to result in "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv). The court finds that

this is not likely. In considering the guidelines, but not treating them as mandatory, and taken together with the statutory factors set forth in 18 U.S.C. § 3553(a), the court sees no reason why it would not impose the same sentence. That sentence is reasonable and it would be reasonable to impose that sentence if the court were directed to reconsider defendant's sentence in light of *Booker*. Accordingly, the court holds that release on bail is not justified by the fact that the court relied on the then-mandatory United States Sentencing Guidelines for the purpose of determining defendant's sentence. The court therefore denies defendant's motion for release on bail pending appeal.

CONCLUSION

For the reasons stated above, defendant's motion for release on bail pending appeal is DENIED.[6] Defendant is hereby ordered to surrender into custody on April 29, 2005 at 12:00 p.m.

IT IS SO ORDERED.

Dated: April 11, 2005 /s/ Marilyn Hale Patel
MARILYN HALE PATEL
District Judge
United States District Court
Northern District of California

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[1] Specifically, section 287 provides that:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287.

[1] Defendant also seeks the reversal of his conviction for conspiracy on the ground that the verdict on that count was tainted by the court's failure to instinct the jury that materiality is an element of the substantive offense of making false claims upon the United States. For reasons that will become apparent below, the disposition of this claim on appeal will be dictated by the failure of defendant's materiality argument.

[3] In *Gaudin*, the Ninth Circuit, sitting en banc, held that proof of materiality of falsehood under section 1001 is a question of fact that must be submitted to a jury. 28 F.3d at 951. However, in so holding, the court distinguished section 1001 from other criminal perjury and false statement statutes, noting that "the issue of materiality in most of these statutes is a question of law for the judge." *Id.* at 945. Relying in part on this statement, the *Taylor* court rejected the defendant's argument that failure to give a materiality instruction warranted reversal of his convictions under section 287. 66 F.3d at 255. Defendant contends that in reaching this conclusion, *Taylor* incorrect cited *Gaudin* to support a proposition of law that the latter decision in fact overruled; namely, that the issue of materiality is a question of law for the judge. However, if materiality is not an element of an offense the materiality of the particular false statement made in furtherance of that offense need not be determined by either the judge or by the jury. *See United States v. Uchimura*, 125 F.3d 1282, 1284 (9th Cir. 1997) (characterizing *Gaudin's* question of law-question of fact distinction as a "syllogism"), *cert. denied*, 525 U.S. 863 (1998). For that reason, the question of whether *Taylor* correctly interpreted the Ninth Circuit's en banc decision in *Gaudin* does not bear upon the issue the defendant seeks to present on appeal. Accordingly, the court declines defendant's invitation to off its opinion as to whether *Taylor* was correctly decided.

[4] It should also be noted that even assuming that defendant did not waive his objection to the court's failure to give a materiality instruction by withdrawing that objection prior to trial, the failure to give such an instruction is subject to harmless-error analysis on appeal. *Neder*, 527 U.S. at 15. In the case at bar, a jury has already found that defendant knowingly presented the Medicare program with false claims seeking reimbursement for nursing services costs. It cannot reasonably be doubted that such claims were intended to cause Medicare to reimburse defendant for those costs and that, consequently, the false statements contained therein were material. Thus, any error that might have resulted from the court's failure to give a materiality instruction was harmless beyond a reasonable doubt.

[5] Section 1001 reads in pertinent part:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation;
>
> or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years, . . . or both.

18 U.S.C. §1001(a).

[6] At the hearing on this motion, defendant also raised for the first time the argument that his convictions on the false claims counts should be reversed because the fraudulent Medicare cost reports on which the charges against him were premised cannot be considered a "claim" within the meaning of 18 U.S.C. § 287. Defendant cites no authority for this proposition, and his argument appears to rely solely on the fact that the government has generally prosecuted similar conduct under section 1001. However, even if such reasoning amounted to a cognizable legal theory – a dubious proposition at best – the court need not consider an argument that was raised for the first time at a post-trial hearing held more than two years after the date that defendant was adjudged guilty. The court therefore declines to address the issue of whether a Medicare cost report amounts to a "claim" under section 287.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. ST. LUKE'S SUBACUTE CARE HOSPITAL, INC.; et al., Defendants – Appellants.	No. 04-10231 D.C. No. CR-02-00044-MHP Northern District of California, San Francisco ORDER (Filed Jul. 11, 2006)

Before: B. FLETCHER, BEEZER, and FISHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Fisher votes to deny the petition for rehearing en banc and Judges B. Fletcher and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.